

MEMBER UPDATE

**Confidential
Attention: Licensee**



19 December 2016

Members Guide to Public Holidays and Pay Rates Christmas and New Year 2016/17 *Restaurant Industry Award 2010*

This information is provided as a guide only. Members should contact the HR/IR team to discuss their specific circumstances where required.

This information Guide outlines the public holidays over the Christmas and New Year Period and the employee entitlements on these days under the Restaurant Industry Award 2010 ('RIA').

This year both Christmas Day and New Year's Day fall on a Sunday. When this occurs both that day and the following Monday are declared as Public Holidays in accordance with the Public Holidays Act NT – Schedule 2. The result is that five days are deemed to be Public Holidays for what would otherwise be 3 days (excluding the part day public holidays) and these days are outlined below.

Please note that public holidays, including part days and the declaration of any additional or substitute day, is a matter for the Territory Government. The *Fair Work Act 2009* (Cth) and the *RIA* recognise those days and prescribe what an employee is entitled, or not entitled to on the prescribed public holidays.

1. Christmas and New Year Public Holidays

The public holidays over the Christmas and New Year Period are as follows:

Christmas Eve – part day	Saturday 24 December 2016 – 7pm to midnight only
Christmas Day	Sunday 25 December 2016
Christmas Day – additional day	Monday 26 December 2016
Boxing Day	Tuesday 27 December 2016
New Year's Eve – part day	Saturday 31 December 2016 – 7pm to midnight only
New Year's Day	Sunday 1 January 2017
New Year's Day – additional day	Monday 2 January 2017

Members are reminded that for the purposes of determining the relevant pay and conditions for a particular public holiday, a 'day' means that day ie 12.01am until midnight.

2. Commonly used terms

The following terms are used throughout the document and are taken to have the following meanings:

Ordinary rate – this means the base rate of pay for the applicable level, excluding any penalty rate or loading that may be applicable on certain days or at certain times (for example the base rate of pay for a Level 2 is currently \$18.91).

Public Holiday – reference to a public holiday means either a full day or part day public holiday.

Public holiday not worked ('PHNW') – a day on which an employee would normally work but for a public holiday falling on this day and the venue deciding to close entirely, close an area(s) in which the employee would normally work or rostering fewer employees due to a quieter trading period. The employee is not rostered to work because of one of these reasons, as opposed to the day being an RDO.

RDO – means the days which the employee is not rostered to work in a given week (ie their normal days off).

3. Employee Entitlements (Non-salaried)

3.1 Casual Employee

3.1.1 Minimum Engagement

A casual employee must be paid for a minimum of two hours work when working on a public holiday. (RIA cl 34.4(b)). The minimum engagement will be met in the event the employee works across both public holiday and non-public holiday hours.

3.1.2 Payment for work performed on a public holiday

A casual employee receives a penalty rate of 250% (inclusive of the 25% casual loading) for all time worked on a public holiday. The 10pm to midnight and midnight to 7am penalties do not apply to any hours worked on a Public Holiday that falls on a weekday.

A casual employee does not receive any additional entitlement for not working on a public holiday.

Example: casual employee entitlements

Barry is a casual Level 2 Food and Beverage Attendant. He works on Saturday 24 December from 5pm until 11pm, Monday 26 December 5pm until 11pm and Tuesday 27 December 5pm until 10pm. Barry would receive the rate of pay as outlined below (for the purposes of this example meal breaks have not been taken into account). He is not entitled to any additional entitlement for not working on Christmas Day, despite it being a public holiday.

<u>Day</u>	<u>Time</u>	<u>Rate</u>
Saturday 24 December	5pm until 7pm	150% (Saturday rate)
Saturday 24 December	7pm until 11pm	250%
Monday 26 December	5pm until 11pm	250%
Tuesday 27 December	5pm until 10pm	250%

3.2 Full time Employees (hourly paid)

3.2.1 Minimum Engagement

A full time employee must be paid for a minimum of 4 hours work on a public holiday. (RIA cl 34.4(a)). As a full time, employee, must work a minimum of 6 hours per shift, the four hour minimum will be satisfied. The minimum engagement will be met in the event the employee works across both public holidays and non-public holiday hours.

The minimum engagement must be satisfied regardless of whether the employee physically works the hours. Members should be mindful of this in Christmas day in particular where many venues may only open for the Christmas lunch period.

3.2.2 Payment for work performed on a public holiday

A full time employee receives a penalty rate of 250% for work performed on a public holiday. The 10pm to midnight and midnight to 7am penalties do not apply to any hours worked on a public holiday that falls on a weekday.

Note: cl 34.4(d) does not apply as although Christmas Day falls on the weekend, it is a prescribed public holiday.

3.2.3 RDO (day off) falls on a public holiday – additional entitlement

A full time employee whose RDO falls on a Public Holiday will under cl 38.2 be entitled to either:

- An extra day's pay (to be paid at ordinary rates, not public holiday rates), or
- An alternative day off within 28 days (to be paid at ordinary rates, not public holiday rates), or
- An additional day of annual leave.

On a part day public holiday, an employee will only be entitled to the above benefit for the hours they would normally work between 7pm and midnight, if any.

Example: RDO coincides with a public holiday (full day)

For the week commencing 19 December 2016, Charlene is rostered to work on Tuesday 20 December, Wednesday 21 December, Thursday 22 December, Friday 23 December and Saturday 24 December. Therefore, her RDO's for that week are Monday 19 December and Sunday 25 December. Sunday is Christmas Day, therefore Charlene will be entitled to the benefits of cl 38.2, that is either an extra days pay, an alternative day off within 28 days or an additional days annual leave. Charlene will receive 6 day's pay for 5 day's work.

Example: RDO does not coincide with a public holiday

For the week commencing 26 December Katut is rostered to work Monday 26 December, Tuesday 27 December, Wednesday 28 December, Saturday 31 December and Sunday 1 January. Katut's rostered day's off are Thursday and Friday, neither of which are public holidays. Katut will not receive the additional entitlement under cl 38.2 however he will be entitled to be paid the public holiday penalty rate on Monday, Tuesday, Saturday (only if working after 7pm) and Sunday.

Example: RDO coincides with a part day public holiday

For the week commencing 19 December, Fred is rostered to work Monday 19 December, Tuesday 20 December, Wednesday 21 December, Thursday 22 December and Sunday 25 December. Fred normally works from 11am until 2.30pm and 5pm until 10pm (inclusive of meal break) on the first four days of the of the week and 4pm until 10pm on Sundays. Fred's RDO falls on Christmas Eve. He will only be entitled to the benefit of cl 38.2 for the 3 hours that he would normally work after 7pm, not the full shift.

3.2.4 Public Holiday not worked

A public holiday not worked is to be treated differently to an RDO. This is because was it not for the venue choosing to close either the whole venue or an area(s) of the venue on a public holiday or deciding to roster fewer employee due to a quieter trading period, the employee would have otherwise worked on that day. In such situation, the employee will be entitled to be paid for the hours they would have otherwise worked but for the decision to close, at their ordinary rate of pay.

Example: Reduction in services

Cherie is a fulltime breakfast Chef. On Monday she would normally work from 6.00am until midday. The Restaurant decides to reduce the breakfast menu during the Christmas period meaning Cherie is not required to work on Monday 26 December. As this is not an RDO and she would have otherwise worked this day but for the reduction in services, Cherie is entitled to be paid 6 hours work at ordinary rates. In this week Cherie will be paid for 5 days work even though she only ends up physically performing work on 4 days that week.

Example: Venue closed on Christmas Day

Chung works at a CBD Nightclub as a full time Duty Manager. The Nightclub does not open on Christmas Day. Sunday is one of Chung's normal working days. Due to the Nightclub being closed on Christmas Day, Chung is not rostered to work on that day. Chung will be paid ordinary rates for the hours he would normally work on that day.

Example: Christmas Day

Paul is a full time Restaurant Manager at Sunshine Café. Sunshine Café opens for 4 hours on Christmas Day for the lunch service. Paul would normally work 9am until 3pm on Sunday, but as it is Christmas Day he will only work between 11am to 3pm. Paul will receive the penalty rate for these 4 hours. The other 2 Hours of which he would normally work will be paid at the ordinary rate, as it will be deemed as a public holiday not worked.

3.2.5 Annual Leave coinciding with a public holiday

The *Fair Work Act 2009* (Cth) at s 89 specifies that if a part day or full day public holiday falls during an employee's period of paid annual leave, the employee is not taken to be on annual leave for the day or part day. On such days the employee is paid for the hours of the part day or full day which they would normally work, without any deduction from their annual leave entitlements. Hours that fall outside public holiday hours are to be deducted from their annual leave entitlements.

An employee on unpaid leave is not entitled to the benefit of the public holiday.

Example: annual leave coinciding with a public holiday

Brad is a full time Apprentice Chef. He works from 3.24pm until 11pm Wednesday to Sunday (7.6 hours per day). Brad is the Christmas Grinch and so has decided to go away over the Christmas period. He takes 1 week annual leave commencing 19 December. He will be paid as follows:

Monday & Tuesday	RDO's – no pay for these days
Wednesday, Thursday and Friday	Deduction from annual leave entitlement for all hours (7.6 x 3)
Saturday (Christmas Eve)	4pm to 7pm = deduction from annual leave 7pm to 11pm = paid at ordinary rates, no deduction from annual leave
Sunday (Christmas Day)	7.6 hours at ordinary rates, no deduction from annual leave

3.3 Part time employees

3.3.1 Minimum engagement

A part time employee must be paid for a minimum of 4 hours work on a public holiday. (*RIA* cl 34.4(a)). Such employee must receive payment for 4 hours even if their normal agreed hours on that particular day only equates to a 3 hour shift.

The minimum engagement will be met in the event that employee works across both public holiday and non-public holiday hours.

3.3.2 Payment for work performed on a public holiday

A part time employee receives a penalty rate of 250% for work performed on a public holiday. The 10pm to midnight and midnight to 7am penalties do not apply to any hours worked on a Public holiday that falls on a weekday.

3.3.3 RDO (day off) falls on a public holiday

Unlike a full time employee, where a part time employee's RDO coincides with a public holiday there is no additional entitlement even if the part time employee works 5 days per week. This is because cl 38.2 only applies to full time employees.

Example: part time RDO coinciding with a public holiday

Nancy is a part time Barista. She works 15 hours per week spread evenly across Tuesday, Wednesday and Thursday. Therefore, Nancy has RDO's on Friday, Saturday, Sunday and Monday, the days on which most of the public holidays fall over the Christmas period. Nancy does not receive any entitlement for not working those public holidays because she would not ordinarily work those days. Nancy will be entitled to the appropriate penalty rate for work performed on Tuesday 27 December.

3.3.4 Public holiday not worked

A public holiday not worked is to be treated differently to an RDO. This is because was it not for the venue choosing to close either the whole venue or an area(s) of the venue on a public holiday or deciding to roster a few employees due to a quieter trading period, the employee would have otherwise worked on that day. In such a situation, the employee will be entitled to be paid for the hours they would have otherwise worked at their ordinary rate of pay.

Example: Downturn in business

Sue is a part time bistro attendant at an inner suburban restaurant. She works 20 hours per week, spread evenly across Tuesday to Friday. The venue is always very quiet in the first week of the New Year. Therefore, in the week commencing 2 January she is not rostered to work on Tuesday and Wednesday. Sue will need to be paid at the ordinary rate based on the hours she would have otherwise worked on these days.

3.3.5 Annual Leave coinciding with a public holiday

See 3.2.5 as the same principle applies.

4. Employee Entitlements (Salaried)

4.1 Annualised Salary – cl 28

4.1.1 Employee works on a public holiday

An employee being paid in accordance with cl 28 is entitled to time off in lieu or a day added to their annual leave entitlement (*RIA* cl 28). In the event an employee works across a 'normal' day and a public holiday (part day or full day), the employee will only be entitled to this benefit for the hours actually worked which fall on the public holiday.

Example: Time in lieu

Percy is a Bar employee and is paid a salary in accordance with cl 28. He works 5 days per week and is paid \$907.38 per week (before tax). Percy normally works from 2pm until 10.30pm, Wednesday to Sunday. For work performed in the week commencing 26 December, Percy will be paid \$907.38 as per usual. He will also receive 3.5 hours time in lieu for work performed on New Year's Eve (7pm until 10.30pm only) and also a day in lieu for working on New Year's Day (8 hours excluding meal break).

4.1.2 Employee does not work on a public holiday

There are two possible scenarios which may arise here. Firstly, where an employee's RDO falls on a public holiday and secondly where it is a PHNW for the employee.

Where an employee's RDO falls on a public holiday they may be entitled to the benefits of cl 38.2 (see section 3.2.3 of this paper). Members should refer to the employee's Contract of Employment to determine whether or not this entitlement has been included in the salary rate or not. Where it has, such employee will receive no additional entitlement in such situation.

Where it is a PHNW the employee will still receive their ordinary salary for the week even though they have only worked 4 days that week, not 5. This may occur in examples such as where the decision is made to close the venue or an area of the venue for the public holiday and the employee would have otherwise worked on that day.

Example: venue closed

Leigh is a Food & Beverage Attendant who receives \$935.46 per week. Her salary has been calculated to incorporate the benefit of cl 38. She works from Wednesday to Sunday. Leigh is not required to work on Sunday 25 December as the venue is closed meaning she will only work 4 days this week. Leigh will however still receive her normal weekly salary of \$935.46. The following week, Leigh's RDO falls on Monday and Tuesday both of which are public holidays (26 and 27 December). Leigh receives no entitlement for these days.

4.1.3 Annual Leave coinciding with a public holiday

See 3.2.5 as the same principle applies.

5. Frequently Asked Questions

Can we change the roster of an employee (other than a casual) so their RDO does not fall on a public holiday?

There is no question that the number of public holidays over the Christmas and New Year is going to see a rise in wage costs over this period. However, merely changing the roster of employees is unlikely to result in any significant reduction in costs. The reason being for example:

- Full time hourly paid employees receive the benefits of cl 38.2 where their RDO falls on a public holiday;
- A casual employee must be paid at 250% for any hours worked on the public holiday;
- The result is you end up paying essentially 350% for the public holiday, whereas if the full time hourly paid employee worked you would only be paying 250% as a casual receives no entitlement if they do not work.

In addition to the above, where an employee works a fairly regular roster, they must be consulted with before there is any change to that roster and the reasons for the change.

Can an employee refuse to work on a public holiday?

Yes. An employer has the right under s 114(2) of the *Fair Work 2009* (Cth) to ask an employee to work on a public holiday. However, where that request is unreasonable the employee can refuse to work on the public holiday, provided of course their refusal is reasonable. Whether the request of either party is

reasonable will depend on the circumstances including the employee's personal circumstances, the status of the employee (ie full time, part time or casual), the amount of notice that is given, the employees role as well as the operational requirements of the workplace. Where a refusal by the employee to work is not reasonable, the employee should be disciplined in accordance with the venue's disciplinary policy.

I read in the RIA that we can agree with our employees for a different day to be treated as the public holiday? Is that correct?

Yes, however it should be approached with caution. Under cl 38.1 of the *RIA* an agreement can be made between employer and the majority of employees that an alternative day will be taken as the public holiday instead of one of the prescribed public holidays. An employer cannot coerce employees into agreeing to such arrangements.

The public holiday entitlements as outlined in this document would apply on the day as agreed to be the public holiday for that venue, rather than the prescribed public holidays. Therefore, the only benefit as such of doing this is to spread out the wages costs over a longer period. There will be no additional reduction in wages costs across the year as this arrangement does not reduce the number of public holidays per se.

6. Further information

Members requiring further information should contact the AHA NT Office on 8981 3650.